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No. 91-1594

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, et al.,
Petitioners,

v.

SCOTT FANE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

v. CASE NO. TCA 88-40264MMP

FRED H. EDENFIELD, JR., et al.,

Defendants.

ORDER

This case comes before the court on plaintiff's motion for summary judgement (Doc. 13). The court heard oral argument and has reviewed all affidavits, exhibits, and memoranda submitted by the parties in making its decision. The plaintiff is entitled to summary judgement as a matter of law, and his motion is GRANTED to the extent discussed below. *See* Fed. R. Civ. P. 56; *Rollins v. TechSouth. Inc.*, 833 F.2d 1525 (11th Cir. 1987).

I. STATEMENT OF THE CASE

The plaintiff, Scott Fane, is a certified public accountant licensed to practice in Florida. Mr. Fane moved from New Jersey to Florida in 1985 and seeks to establish an accountancy practice. In order to build his clientele, he wants to engage in direct, inperson, uninvited[1] solicitation of potential clients. He is precluded from doing so by Rule 21A24.002 of the Florida AdministrativeCode[2] which specifically prohibits this type of commercial speech. The defendant does not dispute that the rules restrict truthful commercial speech about lawful activities, and thereby raise first and fourteenth amendment issues. The present debate centers on whether the restrictions pass constitutional muster in light of recent Supreme Court decisions upholding similar restrictions on attorney solicitation.

The defendant asserts that the primary objective of the rule is to protect the CPA's integrity, independence, and objectivity while performing the "attest function." The "attest function" is the issuance of an independent opinion

1 Defendants concede that Florida's regulations do not prohibit direct, inperson, *invited* solicitation. The state's definition of "invited" is rather broad. For example, a general business discussion during a social gathering invites solicitation. *See* Defendants' Response to Motion for Summary Judgement (Doc. 23, pp.15 16).

2 Section 21A24.002(2) provides "[a] licensee shall not by any direct, inperson, uninvited solicitation solicit an engagement to perform public accounting services...[c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication. Section 21A24.002(3) makes unlawful "any communication which directly or indirectly requests an immediate oral response from the recipient."

regarding a client's financial soundness based on an audit or review of a client's financial statements.[3]

In addition to protecting CPA's and the attest function, the restriction seeks to prevent solicited clients from luring the CPA into a collusive relationship whereby a fraudulent attestation is issued. Such attestations may be used to deceive third parties. Those third parties may be the client's business associates or members of the general public who rely on the CPA's attestation. Additionally, the defendant seeks to preserve the restriction as a way to avoid the difficulties of proving and punishing CPA misconduct.

The defendant claims that the validity of these interests and the means used to serve them are supported by analogy to the Supreme Court's analysis in its series of attorney solicitation cases. *See Shapero v. Kentucky Bar Association,* 486 U.S. 466, 108 S. Ct. 1916 (1988) (personalized mailings to potential clients with foreclosure problems); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985) (printed advertisements directed to drunk drivers and Dalkon shield users); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978) (direct, inperson, uninvited solicitation of accident victims). However, a careful analysis of that series of cases compels the opposite conclusion.

3 Only CPA's perform the attest function, therefore the prohibition does not restrict other providers of related financial services. Although that point seems to dispose of the plaintiff's equal protection argument, this court concludes that the regulation is unconstitutional on other grounds, and never reaches the merits of that claim.

II. INTRODUCTION

Government suppression of the free flow of truthful commercial speech regarding lawful activities should be tolerated only when a substantial government interest is being served by regulations which directly advance that interest. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 638 (1985) (citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 566 (1980)). Furthermore, those regulations must be narrowly tailored to achieve the desired objective. *Board of Trustees of State University of New York v. Fox,* 109 S. Ct. 3028, 3035 (1989) (least restrictive means test explioitly rejected).

The defendant asserts that the justifications for banning direct, inperson, uninvited solicitation by attorneys supports a similar ban on like solicitation by CPA's. The Supreme Court's rationale for upholding the ban on attorney solicitation focuses on two general concerns or factors uniquely associated with attorneys: the possibility of undue influence and overreaching, and the absence of regulatory control. *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 475, 108 S. Ct. 1916, 1922 (1988) When applied to the present case, this analysis reveals that those concerns are not present in the context of direct, in person, uninvited solicitation by CPA's. Even if such concerns were found to be present, a logical distinction between the different types of CPA solicitation could not be made to justify their different treatments.

III. THE FIRST FACTOR

The Supreme Court emphasized in its most recent attorney solicitation decision that "[i]n assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 475, 108 S. Ct. 1916, 1922 (1988). In *Shapero,* the Court struck down a ban on attorneys' direct mailings to potential clients with known particular problems. *Id.* In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985), the Court used similar reasoning in striking down a rule which prohibited newspaper advertising by attorneys. In contrast, the Court in *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), upheld an unqualified ban on direct, inperson, uninvited solicitation of potential clients by attorneys.

In the above cases, the Court recognized that the dangers associated with inperson attorney solicitation which justify its absolute prohibition are not sufficiently strong with respect to other forms of solicitation to warrant similarly harsh treatment. *Shapero,* 486 U.S. at 472, 108 S. Ct. at 1921; *Zauderer,* 471 U.S. at 641; *Ohralik,* 436 U.S. at 465. The dangers associated with direct, inperson, uninvited solicitation by attorneys stem from the profession's training: this background increases the client's susceptibility to exploitation. *Shapero,* 486 U.S. at 475, 108 S. Ct. at 1922; *Zauderer,* 471 U.S. at 642; *Ohralik,* 436 U.S. at 46566. The relevant focus must be on the solicitor's training and opportunity to use this training when engaged in a particular mode of communication. Comparing the dangers threatened by CPA solicitation to the dangers associated with similar solicitation by attorneys reveals the weaknesses in defendants' argument.

First, the professional training of attorneys and CPA's is different. An attorney is "a professional trained in the art of

persuasion." *Ohralik,* 436 U.S. at 465. Unlike other forms of attorney solicitation, facetoface solicitation allows the attorney a chance to practice this art. *Zauderer,* 471 U.S. at 641 (direct solicitation involves "the coercive force of the personal presence of a trained advocate"). Furthermore, the unique behaviors associated with attorneys warrant more restrictive regulations involving inperson solicitation. *Shapero,* 486 U.S. at 472, 108 S. Ct. at 1921. The Supreme Court has expressed concern about the potential client's inability to avoid "a badgering advocate breathing down his neck." *Shapero,* 486 U.S. at 475, 108 S. Ct. at 1922. Consequently, when *lawyers* are engaged in direct, inperson, uninvited solicitation as compared to other sellers of goods or services, "it hardly need be said that the potential for overreaching is significantly greater." *Id.*

The Fourth Circuit extended this reasoning in upholding a ban on certain types of solicitation (including inperson) by people selling preneed funeral contracts. *National Funeral Services. Inc. v. Rockefeller,* 870 F.2d 136 (4th Cir. 1989), *cert denied,* 110 S. Ct. 409. The court noted the peculiarity of upholding a ban outside of the attorney context, noting the very "unique nature" of preneed funeral contract solicitation. *Id.* at 143 n.11. Judge Hall noted the uncommon similarities which warranted the analogy between preneed funeral contract and attorney solicitation as follows: "In both, an advocate trained in the art of persuasion is trying to convince an emotionally vulnerable layperson that he needs professional services." *Id.*

In contrast, CPA's are not trained to be coercive, persuasive, or to take particular advantage of a facetoface situation: their training emphasizes independence and objectivity. In light of the distinctive training given attorneys, the defendant cannot analogize to those Supreme Court decisions which deal with attorney solicitation to justify its ban on direct, inperson, uninvited solicitation by CPA's. The

dangers associated with inperson solicitation by uniquely trained attorneys simply are not present in the CPA context.

Second, the effect on the potential client from an attorney's direct, inperson, uninvited solicitation is substantially different from the effect when the same solicitation comes from a CPA. The two groups of potential clients that are targeted for solicitation are in significantly different positions. An attorney identifies a potential client by his "adverse conditions." *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 465 (1978). Usually, the attorney solicits "victims of misfortune."[4] The ban on attorney solicitation guards against invasions of privacy and additional distress. *Id.* Such dangers are present regardless of the attorney's style of approach or intentions. *Id.* at 465 n.25.

Another factor which enhances the likelihood of exploitation is the client's lack of sophistication about legal matters and services. Id. at 465 n.24. Thus, it is very likely that an attorney will be able to pressure the potential client into *immediately* accepting services that she may not need or want. The client may be left without the benefit of reflection, others' advice, or exploration of the available alternatives. *Id.* at 457.

Whereas attorneys may zero in on an "unsophisticated, injured or distressed lay person," *Id.* at 465, certified public accountants prefer to solicit prosperous business people as potential clients. These people tend to be knowledgeable about financial matters and successful enough to require specialized accounting services: they know what they need

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4 This court recognizes that some potential clients of attorneys will be in the same position as potential clients of accountants. Though these persons are objectively in the same position, the attorney's potential client is quite likely to be in adverse conditions, and will be confronted by a uniquely trained individual. These differences serve to distinguish objectively similar situations.

and whether the accountant can fulfill this need. Furthermore, the solicitation usually takes place in a business setting, a place where the potentialclient will not feel intimidated. Thus, the defendant cannot argue that the CPA solicitation regulation protects the potential client from harms which are likely to accompany the prohibited type of attorney solicitation.

Additionally, the defendant suggests that the disputed regulation prevents fraudulent attestations, thereby insuring that third parties will not rely on such to their detriment. Given the direct advancement requirement of *Central Hudson,*[5] the defendant's efforts to protect parties outside the professional relationship from indirect harm, though understandable, is inappropriate.

Even assuming that protection of third parties is appropriate, several significant problems remain with the defendant's argument. First, there is a causation problem when we try to link the alleged misconduct of the CPA with the harm incurred by the third party. Apparently, the defendant is concerned that the client will exert undue influence on the CPA and exploit a facetoface confrontation to persuade the CPA to commit a fraud. Ultimately, this assertion posits that the client is using the CPA to deceive that client's business associates or members of the general public about her financial soundness. The defendant seems to encourage regulating the innocent and valuable activities of one group to forestall the criminal activities of another. The link between regulation and—forbidden activities seems quite tenuous, if at all existent.

Second, there are problems with the defendant's suggestion that a CPA who uses direct, inperson, uninvited solicitation is more likely to commit fraud than a CPA who uses

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5 *See* discussion above a'p. 1.

other forms of solicitation. The differences between the prohibited solicitation and direct mailings, for example, seem far too superficial: in both cases, the eventual facetoface will give rise to possibilities for collusive and improper behavior. Thus, even if we assume that there exists a causal link between solicitation and misconduct, the defendant's varying treatment of different modes of solicitation is not justified.

Third, the defendant's implicit assumption that a client is more likely to approach an unknown CPA about illegal activities is unfounded. The more logical assumption is that such a client would more likely approach a known CPA with whom she has a long-standing and mutually profitable relationship: the client is more likely to trust such a person and the CPA has more to lose (i.e. an established client) by refusing to cooperate.

As the preceding clearly demonstrates, the defendant has failed to demonstrate a causal relationship between inperson, direct, uninvited solicitation, and accountant misconduct. Similarly, the defendant has failed to prove any harm to third parties as a result of the alleged misconduct. Assuming that defendant had proven some link between this type of solicitation and accountant misconduct, the defendant has not shown how the prohibited form of solicitation is more likely to result in misconduct compared to other permissible forms of solicitations. Therefore, Florida Administrative Code, §§ 21A 24.002 (2) & (3), fail to satisfy *Central Hudson's* requirement that the regulation directly advance a substantial government interest. *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York,* 447 U.S. 557, 566 (1980). Thus, the defendant cannot prove that there is a "reasonable fit" between the objective of preventing fraud and the harsh restriction on speech chosen to accomplish it. *Board of Trustees of the State University of New York v. Fox,* 109 S. Ct. 3028, 3035 (1989).

Further, even if this solicitation does directly result in the alleged misconduct, the present regulation does not reflect the only effective approach. *Fox,* 109 S. Ct. at 3034 (citations omitted). Under Florida Statutes, §§ 473.323(b) & (c), a CPA who engages in fraud in subject to fines, loss of license, and other penalties. As this statute directly addresses the alleged problem and provides adequate remedies, the blanket prohibition on inperson, direct, uninvited solicitation can be viewed only as an unnecessary restriction on speech. *See Shapero v. Kentucky Bar Association,* 486 U.S. 466, 476, 108 S. Ct 1916, 1923 (1988); *Fox,* 109 S. Ct. at 3035 (regulations unconstitutional if "more extensive than their object requires").

IV. THE SECOND FACTOR

The defendant's argument that a blanket prohibition of in person, direct, and uninvited solicitation by CPA's is necessary because of the difficulties in proving the occurrence of misconduct is also unpersuasive. In forwarding this argument, the defendant once again enlists the attorney solicitation cases for help. Once again, this reliance is misplaced. In the attorney context, the alleged misconduct in solicitation is "not visible or otherwise open to public scrutiny and for which it is 'difficult or impossible to obtain reliable proof of what actually took place.' " *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 476, 108 S. Ct. 1916, 1923 (1988) (quoting *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 466 (1978)).

In the CPA context, however, proof regarding alleged misconduct is readily available. The relevant financial data could be obtained via discovery from the client, and then used by an independent accountant to check the questioned financial statements. Irregularities could be uncovered through this relatively simple process, and the accountant

who used improper methods and principles in violation of Florida Administrative Code, Rules 21A22.001008, could be appropriately disciplined. These facts are objectively verifiable. *Cf. Zauderer,* 471 U.S. 644 ("the indeterminacy of statements about law makes it improbable if not impossible to verify its accuracy or truthfulness").

V. CONCLUSION

Florida Administrative Code, §§ 21A24.002(2) & (3), places an unconstitutional ban on protected commercial speech in violation of the first and fourteenth amendments. The Board of Accountancy and State are hereby enjoined from enforcing that regulation as it applied to CPA's who seek clients through in-person, direct, uninvited solicitation in the business context.

DONE AND ORDERED this 13th day of September, 1990.

Maurice M. Paul
United States District Judge